by this Court in *Terry* v. *Ohio*, 392 U.S. 1 (1968), should be reviewed because the ruling conflicts irreconcilably with previous rulings not only of Connecticut courts, but of the New York Court of Appeals. In *People* v. *Taggart*, 20 N.Y. 2d 335 (1967), decided before this Court's decision in *Terry* v. *Ohio*, the New York Court of Appeals held that a police officer, after receiving an anonymous telephone tip that the defendant was carrying a loaded revolver, had a "reasonably based suspicion" that the defendant was armed, and, secondly, was entitled under the facts of the case to search the defendant for the weapon (*id.*, at 337). *See also People* v. *Arthurs*, 24 N.Y.2d 588 (1969). In *Taggart*, the detective learned from the anonymous call that a blond, blue-eyed male about 18 years old, wearing white chino-type trousers, was at a certain location and that he had a loaded .32 calibre revolver in his jacket pocket. Proceeding to the scene, the officer saw a youth, believed to fit the informant's description, standing "in the middle of" some children. *People* v. *Taggart, supra* at 337. After placing the youth against a wall, the detective removed a revolver from his pocket.

It may be noted that the presence of children at the scene was not the critical factor leading the Court to conclude that the seizure of the revolver was proper. As this Court was to later indicate in *Terry* v. *Ohio*, the Court of Appeals also expressed concern for the safety of the police officer, stating:

> "Under the circumstances, the pistol was not only a threat to [the detective's] life but to those who surrounded the defendant at the time he was stopped" (*id.*, at 341).

Further, in an earlier decision, *People* v. *Rivera*, 14 N.Y.2d 441 (1964), *cert. denied*, 379 U.S. 978 (1965), the Court of Appeals explained why prompt action was required by a police officer who, as in the present case, is told in an on-the-street encounter with a passerby that a suspect is believed to be armed:

> "If we recognize the authority of the police to stop a person and inquire concerning unusual street events we are required to recognize the hazards involved in this kind of public duty. The answer to the question propounded by the policeman may be a bullet; in any case the exposure to danger could be very great. We think the frisk is a reasonable and constitutionally permissible precaution to minimize that danger. We ought not, in deciding what is reasonable, close our eyes to the actualities of street dangers in performing this kind of public duty."

We are now told, however, that the reasoning employed by the Court of Appeals in *Rivera* and *Taggart* was incorrect; further, the Circuit Court has apparently concluded that, unless he ignored the informant's tip altogether, Sergeant Connolly was bound to make some sort of further inquiry—of either the informant or respondent—before disarming the respondent, although such a procedure would unquestionably have subjected the officer to an even greater likelihood of physical harm than is present in the ordinary street encounter.

In short, the emerging conflict between the state and federal courts concerning an issue greatly affecting the control of street crime, which is now rising at an ever increasing rate, ought to be reviewed by this Court.

III

Review is also mandated for another reason. The present case permits the Court to decide to what extent, if any, its ruling in *Terry* v. *Ohio* is affected by *Spinelli* v. *United States*, 393 U.S. 410 (1969). In *Terry*, the Court authorized a limited search for weapons

> "* * * where a police officer observes unusual conduct which leads him to conclude in light of his experience that criminal activity may be afoot and that the persons with whom he is dealing may be presently armed and dangerous, * * *." *Terry* v. *Ohio, supra* at 30.

There were, however, no independent observations by Sergeant Connolly, which would have permitted him to make the type of narrowly defined search upheld in *Terry*. Connolly only saw respondent sitting in a parked car at night in a high crime area, which might not reasonably have alerted the officer that a crime was then in progress. But the officer was acting upon a tip from an informant whom Connolly encountered directly across the street from where respondent was seated in his car.

Though the six-judge majority of the Court of Appeals did not explain why the tip was insufficient to justify the removal of the revolver from respondent's waistband, the reasons for this conclusion appear in Judge Friendly's opinion dissenting from the original panel's decision affirming the denial of respondent's application for habeas corpus relief. While acknowledging that a self-protective search for weapons depends only upon a reasonable suspicion that the suspect is armed and dangerous, Judge Friendly was

unwilling to sustain the seizure of the revolver on this ground, stating:

> "I would not find the combination of Officer Connolly's almost meaningless observation and the tip in this case to be sufficient justification for the intrusion. The tip suffered from a three-fold defect, with each fold compounding the others. The informer was unnamed, he was not shown to have been reliable with respect to guns or narcotics, and he gave no information which demonstrated personal knowledge or—what is worse—could not readily have been manufactured by the officer after the event. To my mind, it has not been sufficiently recognized that the difference between this sort of tip and the accurate prediction of an unusual event is as important on the latter score as on the former." Petitioner's Appendix B at pp. 21a.

It appears, therefore, that Judge Friendly ruled that the tip was defective because it did not comply with the two-pronged test formulated by this Court in *Spinelli* v. *United States, supra. See also Aguilar* v. *Texas,* 378 U.S. 100 (1964); *Harris* v. *United States,* 403 U.S. 573 (1971); *Draper* v. *United States,* 358 U.S. 407 (1959). *Spinelli,* it will be recalled, held that where the Government relies upon an informer to establish probable cause, two conditions must be met. It must be shown that the informant is reliable, and there must be an indication of some of the underlying circumstances from which the informant concluded that a crime is being committed. Clearly, the informant to whom Connolly spoke before the officer conducted his search was not shown to be reliable. Though the informant had previously supplied the officer with information concerning homosexual activity at the local railroad station in Bridgeport, the information never resulted in any arrests or con-

victions. *See e.g., People* v. *Hendricks*, 25 N.Y.2d 129, 134 (1969). And, as in *Aguilar* v. *Texas*, the nature of the tip was entirely conclusory, the informant having failed to specify the source of his knowledge that the respondent was armed with a weapon.

Judge Friendly's reliance upon *Spinelli* in the context of the present case raises serious questions, which this Court is now invited to review. Initially, in assessing the sufficiency of the informant's tip under *Spinelli*, Judge Friendly disregarded this Court's previous pronouncement in *Terry* v. *Ohio*, that a self-protective search for weapons, unlike a search made incident to an arrest, need not be based upon a showing of probable cause.

> "The protective search for weapons * * * constitutes a brief, though far from inconsiderable, intrusion upon the sanctity of the person. It does not follow that because an officer may lawfully arrest a person only when he is apprised of facts sufficient to warrant a belief that the person has committed or is committing a crime, the officer is equally unjustified, absent that kind of evidence, in making any intrusions short of an arrest." *Terry* v. *Ohio*, *supra* at 26.

For, an officer who has probable cause to place a suspect under arrest may conduct a search incident to that arrest not only for weapons but also for other incriminating evidence within the suspect's immediate control. *Chimel* v. *California*, 395 U.S. 752, 763 (1969). But, as in *Terry*, the scope of Connolly's initial intrusion with respondent was far more limited than a search incident to an arrest, the officer intending merely to inspect the inside of respondent's waistband—where, according to the informant, a revolver was concealed. The search was therefore

> "reasonably limited in scope to the accomplishment of the only goal which might conceivably have justified its inception—the protection of the officer by disarming a potentially dangerous man." *Sibron* v. *New York*, 392 U.S. 40, 65 (1968).

Yet the Court of Appeals has apparently ruled that Connolly was not privileged to make this "brief intrusion," absent proof that the tip from his informant established probable cause under *Spinelli*.

Further, *Spinelli* was primarily intended to regulate the issuance of search warrants based upon the hearsay communications. To require an applicant for a warrant to investigate the reliability of a new informant and his information may well be reasonable, since there is usually ample time for a law enforcement official to make this sort of inquiry before he decides to present his information to a magistrate. It is quite a different matter, however, to suggest that these investigatory burdens must also be assumed by a patrolling police officer, who is alerted by a passerby in the street that a person lurking nearby late at night is armed with a loaded revolver. It is simply asking too much to have expected Sergeant Connolly to have delayed taking action until he first cross-examined the informant concerning the source of his information and then gathered data demonstrating the informant's reliability. In the meantime, respondent could have easily driven off in his car, thereby negating the effect of the tip entirely.

To be sure, a limited search for weapons must be grounded upon an "articulable suspicion of a crime of

violence." *Terry* v. *Ohio, supra* at 33 (HARLAN, J., concurring). It is for this Court to decide, however, whether, in order to justify such a suspicion based upon a sudden tip received after a brief encounter with a citizen, the tip must meet the standards set forth in *Spinelli*.

We do not take any pleasure in disagreeing with a distinguished federal jurist. But it is a serious matter, where, as occurred in the present case, any appellate court substitutes its own reflective judgment for that of a high-ranking police officer, certainly more experienced in responding to criminal complaints received in the field than a member of the judiciary. While on duty in a high-crime area late at night, Sergeant Connolly unexpectedly came upon a known informant, who reported that a man in a parked car across the street was armed with a loaded revolver. Though not "reliable" under the standards required to establish probable cause, the informant was nevertheless considered trustworthy and reliable by the officer, whom the informant had previously supplied information about other crimes. Also, in appraising the substance of the tip, Connolly knew that the informant was willing to place his credibility on the line and risk an immediate confrontation with a suspect right on the scene. After weighing all of the foregoing circumstances, and after offering to jeopardize his own safety and possibly his life too, Sergeant Connolly is now told that his actions were unreasonable. And, of course, what steps should have been taken by the officer are not specified. Suffice to say, the ruling of the Court of Appeals leaves no discretion to a policeman, who, confronted with a report about a potentially dangerous crime, must make an instant

determination as to the proper course of action to pursue. Such a result was never intended by the commands of the Fourth Amendment.

Further, on the assumption that the Court of Appeals properly extended *Spinelli* to the facts at bar, *Spinelli* should be reconsidered. A plurality opinion joined in by only four members of this Court, *Spinelli* has been recently criticized and its continued vitality severely questioned by the Chief Justice in *Harris* v. *United States*, and by Justice Blackmun, who, concurring in *Harris*, opined that *Spinelli* "was wrongfully decided." *Harris* v. *United States*, *supra* at 586. The present case affords a clear opportunity for the Court to evaluate *Spinelli* further.

Conclusion

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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